

DATE: November 26, 2004

TO : Roberto G. Chavarry, Regional Director  
Region 13

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Banca Di Roma  
2200  
Case 13-CA-41283-1

512-5012-0100  
512-5012-0133-  
512-5012-6737  
512-5024-5400

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by maintaining several rules in its employee handbook. We conclude that all of the submitted allegations should be dismissed, absent withdrawal.

### FACTS

Charging Party [*FOIA Exemption 6 and 7(c)*] is one of 11 employees working in the Chicago Branch office of Banca Di Roma (the Employer). The employees do not have a collective bargaining representative; nor has there been any organizing activity.

In February 2003, [\[1\]](#) the Employer gave all employees a number of documents, including a "Declaration of Secrecy" and a revised employee handbook, and required that the employees acknowledge receipt of these documents. [*FOIA Exemption 6 and 7(c)*] refused to sign the acknowledgements, claiming that he had reservations about the content of the "Declaration of Secrecy" and several of the rules in the employee handbook. In April, the Employer repeated its requirement that [*FOIA Exemption 6 and 7(c)*] sign the acknowledgement forms and [*FOIA Exemption 6 and 7(c)*] again refused. In May, [*FOIA Exemption 6 and 7(c)*] filed the charge in Case 13-CA-41012, alleging that the "Declaration of Secrecy" violated the Act. In July, the Region issued a Section 8(a)(1) complaint in Case 13-CA-41012 alleging that the "Declaration of Secrecy" restrained and interfered with employees' rights to discuss their terms and conditions of employment.

In August, shortly before the hearing in Case 13-CA-41012 was to begin, [*FOIA Exemption 6 and 7(c)*] filed the charge in the instant case, alleging that the Employer is restraining and coercing its employees by maintaining several provisions of the employee

handbook. In particular, the instant charge alleges as unlawful the Employer's policies that, inter alia:

- (1) restrict employees' personal or non-business-related use of the Employer's e-mail and Internet systems; <sup>[2]</sup>
- (2) restrict the use of personal communication devices, such as cell phones and audible pagers; <sup>[3]</sup>
- (3) restrict the use of telephone voice mail; <sup>[4]</sup>
- (4) define and limit employee discussion of confidential information; <sup>[5]</sup> and
- (5) permit Employer monitoring of employee messages sent by e-mail or voice mail, and of employee Internet use. <sup>[6]</sup>

The Region has concluded that employees spend a large portion of their workday communicating by e-mail, and otherwise use the Employer's communication tools as a routine part of their jobs. The employees work in close proximity to one another, and there is no indication that there are any obstacles to face-to-face communication. Both the Employer and Charging Party acknowledge that the handbook rules at issue have never been enforced, and that employees send each other non-business-related e-mails on a daily basis with the Employer's knowledge.

### ACTION

We conclude that all of the submitted allegations should be dismissed, absent withdrawal, as set forth below.

#### The Employer's ban on employees' personal use of e-mail and the Internet.

In Pratt & Whitney <sup>[7]</sup> and several subsequent cases, we issued complaints alleging that, where employees use e-mail and/or the Internet sufficiently to make these systems employee work areas, an employer's complete ban on employees' personal use of them violates Section 8(a)(1). This issue is currently pending before the Board in The Register-Guard. <sup>[8]</sup>

In the particular circumstances of the instant case, however, while the Employer's maintenance of its facial ban on personal e-mail and Internet use would appear to be invalid under Pratt & Whitney, we conclude that it would not effectuate the purposes and policies underlying the Act to allege a violation of the Act. In particular, we base this conclusion upon: (1) the complete disregard of the policy by the Employer and employees alike, as evidenced by the Employer's lack of enforcement of it and the employees daily use of e-mail for non-business-related messages; (2) the absence of any indication that the policies are ever likely to be enforced; and (3) the apparent absence of any chilling effect of the policies on employees' personal use of the Employer's communication systems and the lack of any other concerns over the policies by any employee

other than the Charging Party. The Employer's de facto policy here is clearly one in fact permitting the use of its e-mail and Internet systems for messages of a personal nature.

If the Employer begins to enforce the handbook policy, or evidence arises indicating that the policies are having a chilling effect on protected communication, a complaint attacking the maintenance and enforcement of the policies can issue at that time on an appropriately filed charge. In the absence of any reason to prosecute this allegation at the present time, however, we conclude that it would not effectuate the purposes and policies underlying the Act to do so.

The Employer's ban on employees' use of cell phones and audible pagers.

We also conclude that the Region should dismiss the allegation regarding the restriction on employees' use of personal communication devices, such as cell phones and audible pagers, based on the employer's asserted business justification that these devices create distractions and disrupt regular work routines. It is well established that, even if an employer rule adversely affects employees' protected rights, the Board will strike a balance between the employees' rights and any "legitimate and substantial business justification" demonstrated by the employer in light of the Act and its policy. <sup>[9]</sup>

In the instant case, the Employer's asserted justification, i.e., the tendency of such audible devices to distract and disrupt employees in the workplace, has not been in any way rebutted. The Employer's concerns appear to be legitimate and reasonable, particularly as not all employees are likely to have the same working hours and there is the potential that one employee's use of such devices could affect other employees attempting to work at that time. Moreover, it is likely that the policy will not adversely affect employee protected rights, as employees would not generally use cell phones for protected communication where they all work in close proximity to one another and can easily communicate face-to-face. Based upon these factors, we conclude that the Employer's asserted legitimate business justification is sufficient to outweigh any adverse effects the policy may have on employee protected rights and that, therefore, the Employer's maintenance of the policy does not violate the Act.

The Employer's ban on employees' personal use of its telephone voice mail

We further conclude that the Region should dismiss the allegation regarding the restriction on employees' use of the Employer's telephone voice mail system.

It is unclear under extant Board law whether the Employer has an obligation to permit use of this type of equipment for the exercise of Section 7 rights. Thus, in Mid-Mountain Foods,<sup>[10]</sup> for example, the Board cited dicta in an ALJD in Union Carbide<sup>[11]</sup> for the proposition that an employer can lawfully prohibit all personal use of its telephones and other similar "equipment." But the Board has never expressly held that an employer can lawfully ban non-business use of its telephones. Thus the Board has not yet struck the balance between employer property interests and employee organizational rights with regard to employer-owned equipment like telephones.

It may be argued that, for employees who spend a significant portion of their working time on the telephone and who regularly communicate through the Employer's voice mail, such systems should be treated as workplaces similar to computer e-mail systems. In balancing employees' Section 7 rights against employer property interests in this workplace, an employer might be required to permit some use of its telephones and voice mail system for communication protected by Section 7.

Recognizing that finding such a protected right to use employer telephone voice mail would be somewhat inconsistent with statements made by the Board, albeit in dicta, in the cases cited above, and that such a holding would be a significant extension of the Pratt & Whitney theory, on which the Board has not yet ruled, we do not think that this case presents a good vehicle to present this novel issue to the Board. Thus, the employees here all work in close proximity to one another, there is no indication that there are any obstacles to face-to-face communication between employees, and there is no evidence that the Employer has ever enforced the policy or that its mere maintenance has chilled any protected employee communication. Therefore, we conclude that this allegation should be dismissed, absent withdrawal.

#### The Employer's definition of, and limitations on, employee discussion of confidential information.

We additionally conclude that the Region should dismiss the allegation regarding the Employer's definition of, and limitations on, employee discussion of confidential information. In Lafayette Park Hotel,<sup>[12]</sup> the Board held that an employer's rule prohibiting disclosure of "Hotel-private information" was lawful, because it was reasonably addressed to protecting proprietary information and did not implicate employee Section 7 rights. In Mediaone of Greater Florida, Inc.,<sup>[13]</sup> the Board held lawful a rule that employees "may not use or access the proprietary information of the company or others for personal purposes or disclose non-public information outside the company." The Board found that the rule did not explicitly prohibit Section 7 activity and that, read in context, it applied only to proprietary business information, such as

intellectual property, and not to discussion of employee wages and working conditions. The Board further noted that the employer had not, through enforcement or other action, led employees to believe that the provision restricted employee Section 7 activity.

Similarly here, while the Employer's policy sets forth a broadly-worded definition of confidential information, it does not specify any restriction of employee discussion of terms and conditions of employment and appears to be directed at the protection of proprietary and sensitive bank account information. Thus, the Employer's policy reasonably "would be understood by employees as protecting from disclosure only the Respondent's proprietary private business information and would not reasonably be construed as restricting discussion or disclosure of employees' own terms and conditions of employment."<sup>[14]</sup> Therefore, this allegation should be dismissed, absent withdrawal.

The Employer's monitoring of employee messages sent by e-mail or voice mail and employee use of the Internet.

Finally, we conclude that the Region should dismiss the allegation regarding the Employer's policy permitting it to monitor employee messages sent by e-mail or voice mail, and to monitor employee use of the Internet. While we are not aware of any cases directly addressing this issue, we find such monitoring lawful based on the Board's decisions regarding other types of workplace monitoring. Thus, it is well established that employer surveillance of employees does not violate the Act if instituted in response to legitimate employer concerns and not to employees' Section 7 activity.<sup>[15]</sup>

In the instant case, the Employer has clearly set forth legitimate business purposes for its monitoring policy -- protecting "systems administration and quality control" and policing "illegal, unethical or offensive conduct that may threaten the Bank's interests or the rights of other employees." Moreover, the policy was not enacted in response to any employee Section 7 activity. Therefore, we conclude that the Employer's legitimately based monitoring policy does not violate the Act.

Accordingly, the Region should dismiss all of the submitted allegations, absent withdrawal.

B.J.K.

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[1] All dates hereinafter are in 2003, unless otherwise noted.

[2] The handbook states that all electronic and telephonic communication systems, specifically including e-mail, the Internet, and telephone voice mail, are to be used "solely for legitimate job-related purposes" and should not be used for "personal communications" or for "[s]oliciting or proselytizing on behalf of political or religious causes or other persons or organizations not affiliated with the Bank."

[3] The handbook states: "Because they create distractions and disrupt regular work routines, the use of personal communication devices such as cellular or portable phones and audible pagers is prohibited during work hours and in work areas . . . . An exception is set forth for approved use during "ongoing personal emergency situations (such as the imminent birth of a child)."

[4] See fn. 2.

[5] The handbook states: "Each employee of the Bank is obligated to treat all of the information on the computer as proprietary and confidential of the Bank," "the information contained on the Bank's computer system is to be considered, at all times, as privileged material," and "no aspect of any matter contained on the Bank's computer system should be discussed or divulged to anyone outside the Bank."

[6] The handbook states: "To ensure that the use of electronic systems, electronic and telephone communications systems, computer, e-mail system, Internet and other business equipment is consistent with Banca Di Roma's legitimate business interests, authorized representatives of Banca Di Roma may monitor the use of such equipment and all communications and information transmitted, received, stored on or developed with Bank systems or any such equipment at any time" and "The Bank may monitor e-mail, voice mail and other messages for purposes of systems administration and quality control, and as needed to protect against illegal, unethical or offensive conduct that may threaten the Bank's interests or the rights of other employees."

[7] Case 12-CA-18446, et al., Advice Memorandum dated February 23, 1998.

[8] Case 36-CA-8743-1, et al., JD(SF)-15-02 (2002).

[9] See, e.g., Jeannette Corp. v. NLRB, 532 F.2d 916, 918 (3d Cir. 1976) ("Rules governing the conduct of employees on company time and property are often necessary and an employer has a right to maintain them. . . . 'Opportunity to organize and proper discipline are both

essential elements in a balanced society,'" quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).

[10] 332 NLRB 229, 230 (2000).

[11] 259 NLRB 974, 980 (1981), enfd. in relevant part, 714 F.2d 657, 663-664 (1983).

[12] 326 NLRB 824, 826 (1998), enfd. mem. 203 F.3d 52 (D.C. Cir. 1999).

[13] 340 NLRB No. 39, slip op. at 3 (2003).

[14] Ibid.

[15] See, e.g., Lechmere, Inc., 295 NLRB 92, 99-100 (1989), enfd. 914 F.2d 313 (1st Cir. 1990), rev'd. on other grounds 502 U.S. 527 (1992) (installation of rooftop security cameras, as in employer's other stores, lawful).